NO. 88-1183

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

J. D. WHITE, Warden,

PETITIONER,

VS.

JERE CHATOM,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

OF

DON SIEGELMAN
ATTORNEY GENERAL OF ALABAMA

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL OF ALABAMA

COUNSEL OF RECORD

ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130
(205) 261-7300

ATTORNEYS FOR PETITIONER

QUESTIONS PRESENTED

1. Did the Eleventh Circuit Court of Appeals misconstrue the burden of proof in Strickland v. Washington, 466 U.S. 668 (1984) to require the State to disprove the prejudice prong of the Strickland test and thus place itself in conflict with this Court's Strickland opinion and other circuit's opinions holding the burden is on the habeas petitioner to prove prejudice?

2. Did the Eleventh Circuit Court of Appeals impermissibly substitute its finding of facts for those of the District Court contrary to the clearly erroneous rule and contrary to Amedeo v. Zant, 108 S.Ct. 1771 (1988)?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED----------	i
PARTIES----------	ii
TABLE OF CONTENTS----------	iii
TABLE OF CASES----------	iv
OPINIONS BELOW----------	1
JURISDICTION----------	2
CONSTITUTIONAL PROVISION INVOLVED----------	2
STATEMENT OF THE CASE----------	2
STATEMENT OF THE FACTS----------	6
ARGUMENT----------	8
CONCLUSION----------	23
CERTIFICATE OF SERVICE----------	24

TABLE OF CASES

	PAGE
Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985)----------	9
Amedeo v. Zant, 108 S.Ct. 1771 (1988)----	17
Anderson v. City of Bessemer, N.C., 470 U.S. 546, 105 S.Ct. 1504, 84 L.Ed. 2d 518----------	17
Fink v. Lockhart, 823 F.2d 204 (8th Cir. 1987)----------	11
Montgomery v. Peterson, 846 F.2d 407 (7th Cir. 1988)----------	11
Strickland v. Washington, 466 U.S. 668 (1984)-------	10
Sullivan v. Fairman, 819 F.2d 1382, 1390 (7th Cir. 1987)----------	11

OPINIONS BELOW

1. The opinion of the Eleventh Circuit Court of Appeals, reversing and remanding the denial of Respondent's petition for a writ of habeas corpus is not reported yet but is reproduced as Appendix A.[1]

2. The District Court's opinion denying Petitioner's petition is not reported but is reproduced as Appendix B.

3. The opinions of the State Appellate Courts are reported as Chatom v. State, 348 So.2d 828 (Ala. Cr. App. 1976), rev'd, Chatom v. State, 348 So.2d 838 (Ala. 1977), affirmed on remand, 348 So.2d 843 (Ala. Cr. App. 1977).

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[1]The Appendix to this petition is separately bound pursuant to Rule 21.1(k).

JURISDICTION

The judgment of the Eleventh Circuit was rendered October 27, 1988. Petitioner's timely rehearing and rehearing en banc were denied on December 19, 1988. This petition is filed within sixty days of that denial and is thus timely under Rule 20.4 of this Court. Thus, this Court has jurisdiction under 28 U.S.C. §1257(1).

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution which requires effective assistance of counsel.

STATEMENT OF THE CASE

Respondent was convicted for killing two law enforcement officers in 1976. On direct appeal, Respondent's conviction was reversed by the Alabama

Court of Criminal Appeals on the ground that the atomic absorption test was erroneously admitted. Chatom v. State, 348 So.2d 828 (Ala. Cr. App. 1976). The Alabama Supreme Court reversed the Court of Criminal Appeals, 348 So.2d 838 (Ala. 1977), holding that the test was admissible as a matter of state law. On remand the Court of Criminal Appeals affirmed Respondent's conviction. A subsequent coram nobis petition was denied and affirmed on appeal.

On December 14, 1981, Respondent filed a 28 U.S.C. §2254 petition. He raised three grounds including a claim that his trial counsel was ineffective in connection with the handling of the atomic absorption test. (R1-1-3)

Ultimately the case was submitted to Magistrate Sims on the pleadings and the state court record.

On January 23, 1985, Magistrate Sims issued a recommendation that the petition be denied. (R1-34-22).

Thereafter, through new counsel Honorable Wanda J. Cochran (R1-39-1), an amended petition was filed (R1-46-1) raising three additional grounds: (1) that the admission of the atomic absorption test rendered Petitioner's trial fundamentally unfair; (2) that the prosecutor's failure to disclose the results of the test violated the trial court's disclosure order and (3) that allowing evidence implicating Petitioner in the death of Wilson rendered the trial fundamentally unfair. (R1-46-1-2). The Petitioner asserted that issues two and three were barred from review by procedural default under Wainwright v. Sykes, 433 U.S. 72 (1972). (R1-51-1-20). Magistrate Sims recommended that the amended petition also be denied. (R2-66-1-4).

On August 31, 1987, Judge Cox entered an opinion and order dismissing the claims raised in the original petition on the merits. (R2-80-7). Finally, on November 20, 1987 Judge Cox ruled that the claims raised in the amended petition were"procedurally barred" (R2-87-1) and dismissed the remaining claims. He entered a judgment dismissing all the claims on the merits. (R2-88-1).

On October 27, 1988, a panel of the Eleventh Circuit reversed the District Court's judgment and held that counsel's performance was deficient and Petitioner was prejudiced by the deficiency under Strickland v. Washington, 466 U.S. 668 (1984). Rehearing and a suggestion for rehearing en banc were denied on December 19, 1988.

STATEMENT OF THE FACTS

The facts relating to the predicate laid and trial counsel's cross-examination of McDuffie and examination of Sennett are fully set out in the slip opinion and need not be repeated here. See Appendix A. A thorough summary of all the evidence appears in Chatom v. State, 348 So.2d 828 So.2d 838 (Ala. Cr. App. 1976), rev'd, 348 So.2d 838 (Ala.), aff'd on remand, 348 So.2d 843 (Ala. Cr. App. 1977).

The Magistrate found and the District Court adopted the following facts from the coram nobis hearing relating to counsel's performance at trial. (R1-34-14).

> The trial judge in his coram nobis decision found as a fact that "Mr. Alonzo filed several pretrial motions, conducted extensive jury voir dire in a motion

for change of venue which was more than sufficient to comply with the appropriate procedures regarding grounds for change of venue ... submitting numerous written requested jury charges, and in general conducted a thorough, zealous, and skillful representation of Petitioner."

The trial court further found that "Mr. Alonzo had been practicing criminal law in this Circuit since 1963. He has tried, literally hundreds of felony jury trials. He was in fact appointed to represent Petitioner because the Court wished to ensure that Petitioner would receive the highest quality representation in what were certainly very serious cases." The coram nobis court also noted that Petitioner's appellate counsel, who qualified as an expert, gave his opinion based on review of the trial transcript that Mr. Alonzo rendered excellent representation to Petitioner. The Magistrate has read the entire state court record and the findings of pure historical fact regarding Mr. Alonzo's efforts set out in the coram nobis court's opinion are supported by the record.

> Additionally, the mixed findings/conclusions regarding the quality of counsel's performance at the trial of the case are supported by the record. Additionally, the mixed findings/conclusions regarding the quality of counsel's performance at the trial of the case are supported by the record. Counsel made a thorough and diligent effort to cross-examine witnesses, to raise and highlight the uncertainty regarding Petitioner's participation in the shooting, and to make appropriate evidentiary objections in general.

Based on the above facts, the District Court found counsel's performance was not deficient under Strickland.

ARGUMENT

The Petitioner asserts that the Eleventh Circuit has applied the wrong standard of prejudice when it wrote, "Due to the general verdicts rendered by the jury which may have convicted Chatom

one of two different theories of liability, this court cannot say that evidence of the atomic absorption test did not have a prejudicial affect upon the jury's verdict." (App. A at emphasis added). This language implies that the burden was on the Petitioner to prove that the evidence did not have an impact when the correct burden is on the Respondent to prove by a preponderance of the evidence that the evidence did have an impact. The correct standard was stated in Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985) wherein the Eleventh Circuit wrote:[2]

> The question, then, is whether Aldrich has shown

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[2]Aldrich is but one of many cases that the Eleventh Circuit has stated that the burden is on the Petitioner to show prejudice. See also: Harich v. Wainwright, 844 F.2d 1468 (11th Cir. 1988) (en banc); McCleskey v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc); Tucker v. Kemp, 762 F.2d 1480 (11th Cir. 1985) (en banc), among others.

> the prejudice that is required to obtain relief for ineffective assistance of counsel. "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." 466 U.S. at ___, 104 S.Ct. at 2067, 80 L.Ed.2d at 696. Aldrich must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonably probability is a probability sufficient to undermine confidence in the outcome." Id. at ___, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

(emphasis added). Clearly, the proper standard required to be found by the Eleventh Circuit is a finding of prejudice not merely that there has been no negation of prejudice. Aldrich merely follows the dictates of this Court's opinion in Strickland v. Washington, 466 U.S. 668, wherein this Court clearly placed the burden of proving prejudice on the defendant.

"... [A] court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the error." id., at 696-697 (emphasis added). The opinion issued in this case places the Eleventh Circuit in conflict with the Seventh Circuit case of Montgomery v. Peterson, 846 F.2d 407 (7th Cir. 1988) wherein that court held that the burden of proof is on the habeas petitioner to prove both prongs of Strickland, citing, Sullivan v. Fairman, 819 F.2d 1382, 1390 (7th Cir. 1987) and the Eighth Circuit case of Fink v. Lockhart, 823 F.2d 204 (8th Cir. 1987), also holding that the burden is on the habeas petitioner to satisfy both prongs of Strickland. Indeed all circuits follow Strickland.

The Eleventh Circuit's opinion required the State to negate prejudice and since there were two verdict theories the State was required to do so under both theories. This is error because the burden of proof under Strickland is on the Petitioner. Even if Respondent could have shown prejudice as to one of the possible theories of liabilities this is not enough. Respondent failed to prove prejudice under both possible verdicts which means that the Respondent should not have prevailed. The panel's decision is also wrong because it failed to consider all of the evidence and instead focused the prejudice inquiry narrowly on one piece of evidence.

For example, under the accomplice theory of liability the admission of the test result could not possibly have resulted in a different outcome because

the State did not have to prove who actually fired the fatal shots. Thus, the test results (proof that Wilson did not recently fire a gun) could not possibly undermine confidence in the jury's verdict. Respondent has not proven that the jury did not convict him under this theory. Therefore, he has failed to carry his burden of proving prejudice.

Under the trigger-man theory, there was other credible evidence from which the jury could conclude Chatom fired the fatal shots. That evidence was the autopsy report which showed Wilson died of a contact gun shot wound. The only person who could have conceivably fired that shot was Chatom since other evidence tended to prove that the shot was not self-inflicted. This evidence along with the other evidence leads inexorably to the

conclusion that Chatom killed the two deputies. More importantly for the present purposes, it demonstrates the lack of prejudice from the admission of the test results because the outcome of the trial even under this theory would have been the same when all the evidence before the jury is considered.

The proper prejudice analysis required the panel to consider "The governing legal standard ...." "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonably doubt respecting guilt." Strickland, at 466 U.S. 695. Furthermore, the panel had to consider all of the evidence before the jury and must take the "unaffected findings as a given" in making the prejudice determination. id., at 466 U.S. 696.

The Petitioner maintains that the panel has not properly credited the State with all of the "unaffected findings", especially under the accomplice theory of liability. As noted above, under this theory the State did not have to negate the possibility that Wilson killed the deputies. Subtracting out the test results, the remaining evidence is more than sufficient for a jury to find beyond a reasonable doubt that Chatom was an accomplice and therefore guilty of murder under state law. The panel's opinion failed to take into account all of the evidence presented.

Likewise, under the trigger-man theory, if the evidence of the test results are subtracted ut then the evidence is sufficient to support the jury's verdict. Therefore, the Respondent has suffered no prejudice from the admission of the test results.

Instead, it has narrowly found on one item of evidence, i.e., the results of the atomic absorption test. This is clearly not the standard envisioned by Strickland. Had the panel properly considered all of the evidence including Sennett's[2] which destroyed the probative value of the test results, the panel would have necessarily reached a different conclusion.

Because the panel's decision shifted the burden of proving prejudice contrary to the clear mandate of Strickland, the Petitioner requests that this Court grant this petition and reverse the lower court's opinion.

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[2]Sennett testified that even under laboratory conditions the test is only 75% accurate. Other testimony establishes that the samples taken were not under laboratory conditions.

II.

Petitioners maintain that the panel did not abide by the clearly erroneous rule and therefore its opinion is in direct conflict with Amedeo v. Zant, 108 S.Ct. 1771 (1988) and Anderson v. City of Bessemer, N.C., 470 U.S. 546, 105 S.Ct. 1504, 84 L.Ed.2d 518.

In Anderson, this Court summarized the law concerning the clearly erroneous rule in the following language:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized, is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing

court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123, 89 S.Ct. 1562, 1576, 23 L.Ed.2d 129 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence

> differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous. United States v. Yellow Cab Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949); see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).
>
> This is so even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.

id., at 105 S.Ct. 1511-1512.

Anderson was applied in Amedeo v. Zant, 108 S.Ct. 1771, 1778 (1988), also a habeas corpus case, wherein the court stated, "The second factual finding rejected by the Court of Appeals is the District Court's conclusion that petitioner's lawyers did not deliberately bypass the jury challenge."

This Court further stated:

> Although there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record to support the District Court's contrary conclusion, as we describe in more detail below. We frequently have emphasized that "[w]here there are two permissible views of the evidence, the factfinder's choice between then cannot be clearly erroneous." Anderson v. Bessemer City, 470 U.S., at 574, 105 S.Ct., at 1512, citing United States v. Yellow Cab, Co., 338 U.S. 338, 342, 70 S.Ct. 177, 179, 94 L.Ed. 150 (1949), and Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 102 S.Ct.2182, 72 L.Ed.2d 606 (1982). We reaffirm that stricture today.

id., at 1778.

Based on this Court's statement that the district court's conclusion that there was no deliberate bypass, Petitioners assert that the district court's conclusion, in this case, that

counsel's performance was not deficient under Strickland is also a fact subject to the clearly erroneous rule.[3]

The district court had numerous facts concerning counsel's overall performance before him. (See statement of the facts, supra). He also knew that counsel had not objected to the test results being admitted. Thus, there was two possible views of the evidence. The district court found that counsel's performance was not deficient. The panel's decision does even attempt to state why this conclusion is clearly

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[3]Petitioners are fully aware of the fact that this Court has held that a claim of ineffective assistance of counsel is one of mixed facts and law. However, this standard does not apply once the claim is properly in federal court and the District Court has found certain facts based on the record before him, then the clearly erroneous standard applies.

erroneous, i.e., why it was left with "the definite and firm conviction" that a mistake was made. Instead it substituted its conclusion for the district court's. Amedeo clearly holds that this is impermissible appellate substitution of its fact finding for that of the district court's.

CONCLUSION

This Court should grant this petition and reverse the Eleventh Circuit Court of Appeals.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
OF ALABAMA
BY-

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

ADDRESS OF COUNSEL:

P. David Bjurberg
Asst. Alabama Atty Gen.
Alabama State House
11 South Union Street
Montgomery, Alabama 36130
205-261-7300

CERTIFICATE OF SERVICE

I, P. David Bjurberg, a member of the Bar of the Supreme Court of the United States, do hereby certify that this ____ day of January, 1989, I did serve a copy of this petition and a copy of the accompanying appendix on Respondent by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Wanda J. Cochran
SILVER, VOIR & INGE
Attorneys at Law, P.C.
4317-A Midmost Drive
Mobile, Alabama 36609

I further certify I have served all parties required to be served.

P. DAVID BJURBERG
ASSISTANT ATTORNEY GENERAL
OF ALABAMA

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ALABAMA STATE HOUSE
11 SOUTH UNION STREET
MONTGOMERY, ALABAMA 36130
(205) 261-7300

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5108

TABLE OF CONTENTS

Appendix	Description	PAGE
A	Opinion of the Court of Appeals for the Eleventh Circuit	1a
B	Opinion of the Southern District Court of Alabama denying Petition for Writ of Habeas Corpus	37a

APPENDIX A

Jere CHATOM, Petitioner-Appellant,

v.

J. D. WHITE, WARDEN,

Respondent-Appellee.

No. 87-7776.

United States Court of Appeals,
Eleventh Circuit

Oct. 27, 1988.

Defendant was convicted of two counts of murder in the first degree by the Circuit Court, Mobile County, Ferrill D. McRae, J., by jury verdict. On appeal, the Court of Criminal Appeals, 348 So.2d 828, reversed and remanded, and the State filed petition for writ of certiorari. The Supreme Court, 348 So.2d 838, reversed and remanded. On remand, the Court of Criminal Appeals, 348 So.2d 843, affirmed. Defendant petitioned for writ of habeas corpus. The United States

District Court for the Southern District of Alabama, No. CA 81-0949-C, Emmett Ripley Cox, J., denied petition. Defendant appealed. The Court of Appeals, G. Ernest Tidwell, District Judge, sitting by designation, held that defense counsel's failure to object to the admission of atomic absorption test results was ineffective assistance of counsel.

Reversed and remanded.

CRIMINAL LAW §641.13(6)

Defense counsel's failure to object to admission ot atomic absorption test results was ineffective assistance of counsel, in murder prosecution; conditions under which test's administrative occurred where questionable at best, and question of defendant's guilt beyond reasonable doubt was close one. U.S.C.A. Const. Amend. 6.

Appeal from the united States District Court for the Southern District of Alabama.

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, TIDWELL*, District Judge.

G. ERNEST TIDWELL, District Judge.

In this case, Petitioner, Jere Chatom appeals from the federal district court's order denying his petition for habeas corpus relief. Following a jury trial, a Circuit Court for Mobile County, Alabama, convicted Chatom of two counts of first degree murder for the shooting deaths of two sheriff's deputies. The Court of Criminal Appeals of Alabama initially overturned the trial court conviction, however, the Alabama Supreme Court, in a 5-4 decision, reversed the Court of

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*Honorable G. Ernest Tidwell, U.S. District Judge for the Northern District of Georgia, sitting by designation.

Criminal Appeal's decision and remanded the case. On remand, the Court of Criminal Appeals, in a per curiam opinion, affirmed Chatom's conviction. In his federal habeas corpus petition to the district court, Chatom raised various challenges to his conviction in state court. The district court denied relief as to all of petitioner's claims. We reverse the district court's denial of a writ of habeas corpus based upon our determination that Chatom did not receive effective assistance of counsel at trial as guaranteed by the Sixth Amendment to the Constitution.

BACKGROUND

Chatom's murder conviction resulted from the shooting deaths of two sheriff's deputies in Mobile County, Alabama on November 17, 1975. The circumstances of the deputies' deaths

are adequately described in Chatom v. State, 348 So.2d 828 (Ala. Crim. App. 1976), rev'd 348 So.2d 838 (Ala. 1977), on remand, 348 So.2d 843 (Ala. Crim. App. 1977).

The state's entire case against Chatom consisted of circumstantial evidence which sought to prove that either Chatom fired the gun which killed the deputies or that Chatom aided and abetted his accomplice, Michael Wilson, who shot the deputies prior to his own death on the day in question. Under Alabama law, either the "trigger-man theory" or the "accomplice theory" could, independently, support a conviction for first degree murder. See Ala. Code, Title 14, §§314 and 14 (1940) (presently codified at Ala. Code §13A-6-25 (1982) and Ala. Code §13A-2-23 (1982) respectively.)

The state's evidence against Chatom at his trial included the results

of an "atomic absorption test" performed on the body of Chatom's accomplice, Wilson. See Chatom, 348 So.2d at 831. The atomic absorption test allegedly indicates whether a person recently fired a gun. The state, by use of the negative results of the test performed on Wilson's body, sought to prove that Wilson did not fire a gun prior to his death on November 17, 1975; the inference rising from such evidence being that if Wilson did not fire a gun on that day someone else, presumably Chatom, fired the shots which killed the deputies.

The state introduced the test results at the conclusion of its case-in-chief through the testimony of Dr. John McDuffie. Dr. McDuffie, a criminal investigator for the Alabama Department of Toxicology, administered the atomic absorption test to swabs taken from Wilson's body, apparently

after the body had been dragged from the place of the incident and after the body had been embalmed. With Dr. McDuffie on the stand, the prosecutor introduced the results of the test in the following manner:

Q. Doctor, who do you work for?

A. The Alabama Department of Toxicology in Criminal Investigation.

Q. Where are you located, Doctor.

A. At Auburn, Alabama.

Q. How long have you been with the department?

A. Approximately three years.

Q. What kind of degrees do you have, please, sir?

A. I have a B.S. in chemistry from Emory University. I have a Ph.D. from Auburn University.

Q. Over the past three years have you had an opportunity to work a machine or an examination called atomic absorption?

A. Yes, I have.

Q. Explain to the jury what that is please, sir.

A. This is a machine that analyzes for certain elements by atomizing the elements due to heat. In other words, what it does is simply vaporize the elements into a light path. Once the elements are in the light path they are picked up by a light path and the machine can analyze as to the amount present or the particular elements present based on the particular light bean that you put through it.

Q. Does this particular test also or will it, along with a number of other things, determine primer residues?

A. Yes, sir.

. . . . .

Q. Do you have an opinion as to whether or not there was any primer residues on these swabs?

A. Yes, sir.

Q. What is that opinion.

A. My tests failed to reveal the presence of

certain elements consistent with primer residues.

Q. Is that consistent with a person not having fired a recently fired weapon?

A. Yes, sir.

Chatom, 348 So.2d at 831-32.

The state proffered this predicate and expert opinion without any objection by Chatom's counsel. The failure to offer any objection on the part of Chatom's counsel occurred despite the fact that the prosecution failed to inform defense counsel of the existence of such test results prior to the commencement of trial as required by an order of the court mandating the production of "any and all reports, examinations, tests, ballistics, or other material completed by the Department of Toxicology." See Trial Transcript at 7 (Order, Motion to

Produce--Granted as to Counts 1, 2, 4, 5, 6 and 7, Denied as to Count 3).

After failing to object to the introduction of the credentials of the expert witness and the opinion proffered by Dr. McDuffie, Chatom's counsel cross-examined the expert as follows:

Q. Is this test infallible?

A. No, sir.

Q. Have you ever run such a test on Milo Sennett?

A. I am not certain as to whether I have or not, sir.

Q. You know who I'm talking about Mr. Milo Sennett?

A. Yes, sir.

Q. What is the accuracy percentage of this machine, of this test, in the last survey you've made?

A. I'm not certain, sir. On tests that I have run myself where I know a gun has been fired, is that what you're asking. I would guess, sir, it's in the neighborhood of 75 to 80 percent of the time.

Q. That is all? Seventy-five to eighty percent of the time?

A. Yes, sir.

Chatom, 348 So.2d at 832.

Following the cross-examination of Dr. McDuffie, Chatom's counsel made a motion to exclude the evidence introduced through McDuffie's testimony; the trial court reserved judgment on the motion. In response to McDuffie's testimony, Chatom's counsel recalled one of the state's witnesses, Mr. Milo Sennett, a state toxicologist, eliciting the following:

Q. ...have you ever heard of the atomic absorption test for primer residue?

A. Yes, I have.

Q. Are you familiar with the test?

A. I am. I know a little bit about it but I wouldn't say that I know a lot about it.

Q. In connection with your work have you ever undergone--in connection with your work in the Department of Toxicology have you ever undergone that test yourself?

A. Yes, I have.

Q. And have you ever undergone that test with a 38 caliber pistol such as that?

A. I have fired several 38 caliber pistols.

Q. All right, and what--did you take a swab of some sort and ...

A. Some swabs were taken of my hands.

Q. All right, and were those in turn examined under the atomic absorption primer residue test?

A. They were.

Q. Did it come back affirmative or negative?

A. On one test that I know about the results came back there was not a significant level of residues on my hand.

Q. In other words, it was negative?

A. It was inconclusive.

Q. Which means did not tell whether you fired a gun or not?

A. That's correct.

Id.

At the conclusion of Sennett's testimony the court addressed Chatom's motion to exclude the results of the atomic absorption test through the following colloquy:

> THE COURT: The only thing that has not been ruled upon is the question of the admissibility of the test performed by Dr. McDuffie. If you have any cases you want submit [sic] to me at this time you can go ahead.
>
> * * * * * *
>
> MR. VALESKA [Assistant District Attorney]: Your Honor, I can cite to this Court, 50 A.L.R. 3d 117, the neutron activation test that was admitted and in that the Court of Appeals for the Second Circuit in New York held that, "The Court noted that a strong showing of unreliability must be made in the trial court," and we submit that has not been made. We cite--there are

numerous cases in here, Judge. This is another new type test they use to find bombs in mail...

MR. ALONZO [Chatom's counsel]: Judge, this has nothing to do with putting something on a man's hand. This neutron activation, I don't know what that is.

MR. VALESKA: Well, you didn't know what the other one was either.

MR. ALONZO: That's right, and you haven't told us...

(Mr. Alonzo and Mr. Valeska speak at once.)

MR. VALESKA: We submit it to the Court for the Court's perusal if you wish. That's our authority.

(Cases submitted to the Court.)

THE COURT: Motion is denied. Gentlemen, you have about 30 minutes.

Id. at 832-33.

Following the evidence phase of the trial, the jury returned general verdicts of guilty to two counts of murder in the first degree. The trial

judge sentenced Chatom to two life terms of imprisonment.

The Alabama Court of Criminal Appeals subsequently overturned Chatom's conviction, remanding the case for a new trial. The court based its decision upon its finding that the trial court admitted the results of the atomic absorption test without a proper predicate. Chatom, 348 So.2d at 834. The court specifically found:

> no testimony concerning the exact time the swabs were taken from Wilson's body. In addition there was no testimony indicating the lapse of time between the shooting or the taking of the swabs, and the time when Dr. McDuffie tested the swabs for gun residue. Needless to say, we are totally without knowledge as to what effect a delay would have on the accuracy of the test. In addition there is no testimony that the 75% to 80% figure would apply to a shotgun as opposed to a pistol where the muzzle is in close proximity to the hand. Thus, the accuracy of the test was not

> sufficiently established by the State.

Id. at 833. By so finding, the Alabama state court held that the trial court wrongly denied Chatom's motion to exclude the evidence of the atomic absorption test. Id. at 834.

On rehearing, the Court of Criminal Appeals, in a per curiam opinion, explicitly reiterated "[f]irst, the conviction of appellant was not reversed to insufficiency of the evidence....[and] [s]econdly, reversal was due to the introduction into evidence of the atomic absorption test without a proper predicate." Id. at 837.

Upon the state's petition for certiorari, the Alabama Supreme Court, in a 5-4 decision, found the atomic absorption test not to be per se admissible. Chatom, 348 So.2d at 843. Four Justices held that the state's predicate for the admission of the test,

adduced without objection from Chatom's counsel, sufficiently established that the trial court did not abuse its discretion in admitting the evidence. Id. Justice Beatty, concurring specially, found that because Chatom's counsel made no objection to the introduction of the test results, he waived any objection to their admissibility even though the predicate, if challenged, may have been found to be deficient. Id. (Beatty, J., concurring specially). In light of the plurality of four justices and the special concurrence of Justice Beatty, the court reversed the decision of the Court of Criminal Appeals overturning Chatom's conviction, and remanded the case to the Court of Criminal Appeals.

On remand, the Court of Criminal Appeals, in a per curiam opinion, concluded that, "[s]ince [the atomic absorption test] is admissible by

default, a jury question is presented." Chatom, 348 So.2d at 844. Finding the evidence of the atomic absorption test admissible based upon a procedural default, the court determined that a jury question existed and found that the jury had before it sufficient evidence and reasonable inferences which could be derived therefrom to support their verdict of guilty. Id. By so finding, the Court of Criminal Appeals affirmed Chatom's conviction. Id.

Following the exhaustion of his direct appeal, Chatom filed a pro se petition for a writ of error coram nobis before the state trial court in April 1980. Chatom's original petition asserted ineffective assistance of counsel as grounds for relief. Following appointment of counsel to assist with the petition, the movant amended the petition on two occasions to conform with procedural requirements.

After an evidentiary hearing before the original trial judge, at which Chatom's trial counsel and other witnesses testified, the original trial court judge denied Chatom's petition for a writ of error coram nobis.

On December 8, 1981, Chatom filed a pro se petition for a writ of habeas corpus in the United States District Court for the Southern District of Alabama. Subsequent to the appointment of counsel, the United States Magistrate for the Southern District of Alabama, recommended that the petition be denied based upon the state court record. Substitute counsel for Chatom filed objections to the recommendation and later sought and was granted leave to amend the original petition. The Magistrate recommended that the amended petition be denied based upon his previous recommendations and upon a finding that two of the petition's

amended claims were procedurally barred under Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

On August 31, 1987, the United States District Judge for the Southern District of Alabama entered an order denying the petitioner habeas corpus relief. This appeal from the order of the district court followed.

DISCUSSION

Petitioner asserts various claims of error by the district court in denying petitioner's petition for a writ of habeas corpus. Finding petitioner's claim of ineffective assistance of counsel at trial to be meritorious, we do not deem it necessary to address any other claims of error presented by petitioner.

Petitioner asserts that by virtue of his trial counsel's handling of the scientific evidence at trial, more

specifically the atomic absorption test, petitioner did not receive effective assistance of counsel guaranteed by the Sixth Amendment. Addressing petitioner's claim of ineffective assistance, the district court held that upon viewing the record, the actions or omissions of Chatom's trial counsel did not rise to the level of actual deficiency required under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). We disagree.

The Sixth Amendment guarantees those criminally accused to have "Assistance of Counsel" for their defense. U.S. Const. amend. VI. The purpose of the Sixth Amendment right to counsel is to protect the fundamental right to a fair trial. Powell v. Alabama, 287 U.S. 45, 53, S.Ct. 55, 77 L.Ed. 158 (1932); Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1010, 82 L.Ed. 1461

(1938); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This protection lies in the skill and knowledge counsel affords a defendant which provides a criminal defendant "ample opportunity to meet the case of the prosecution." Strickland, 466 U.S. at 685, 104 S.Ct. at 2063, 80 L.Ed.2d at 691, citing Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 240, 87 L.Ed. 268 (1942).

Acknowledging the extreme importance of this right, the United States Supreme Court has held:

> That a person who happens to be a lawyer is present at trial alongside the accused ... is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just

> results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland, 466 U.S. at 684, 104 S.Ct. at 2063, 80 L.Ed.2d at 692. Thus, the Court has recognized that the "the right to counsel is the right to effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 1449 n. 14, 25 L.Ed.2d 763, 773 (1970).

When addressing claims of ineffective assistance of counsel, the Supreme Court has instructed that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 668, 104 S.Ct. at 2065, 80 L.Ed.wd at 692-93. The

specific test enunciated by the Court for analyzing ineffective assistance claims is:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.
>
> Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversarial proceed that renders the result unreliable.

Strickland, 466 U.S. at 687, 104 S.Ct. at 2064, 80 L.Ed.2d at 693.

A. DEFICIENT PERFORMANCE

In applying the first prong of the Strickland test, the standard by

which attorney performance is to be judged is that of "reasonably effective assistance." Id. citing Trapnell v. United States, 725 F.2d 149, 151-52 (2nd Cir. 1983). Counsel's representation must be shown to fall below an objective standard of reasonableness. Id. 466 U.S. at 668, 104 S.Ct. at 2064, 80 L.Ed.2d at 693. In reviewing the performance of an attorney in connection with an actual ineffectiveness claim, the court must look at the reasonableness of the attorney's action "in light of all the circumstances." Id. at 668, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. When conducting such a review, the court should "indulge a strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action

'might be considered sound trial strategy.'" Id. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694-95. While the Strickland presumption is demanding, it is by no means insurmountable. Kimmelman v. Morrison, 477 U.S. 365, 382, 106 S.Ct. 2574, 2587, 91 L.Ed.2d 305, 323 (1986).

Strickland's "in light of all circumstances" review does not preclude a finding of ineffective assistance where the alleged deficient actions or omission centers upon a single incident, if that error is sufficiently egregious and prejudicial. United States v. Cronic, 466 U.S. 648, 657 n. 20, 104 S.Ct. 2039, 2046 n. 20, 80 L.Ed.2d 657 (1984). See also Strickland, 466 U.S. at 693-96, 104 S.Ct. at 2067-69, 80 L.Ed.2d at 674; Birt v. Montgomery, 725 F.2d 587, 597-98 (11th Cir. 1984) (en banc) (pre-Strickland) ("When a single error is alleged, the counsel's failure

must be so substantial as to 'stamp his overall performance with a mark of ineffectiveness.'"); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) (pre-Strickland) ("Sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the sixth amendment standard.") While the instance in which a single error will rise to the level of Sixth Amendment ineffectiveness is clearly the exception and not the rule, this case is one of those exceptions.

The state's case against Chatom consisted entirely of circumstantial evidence, no eyewitness could place Chatom as the individual who shot the officers nor could anyone even place Chatom in the vicinity of the area of the swamp where the shooting occurred. See generally Chatom, 348 So.2d 828 (Ala. Crim. App. 1976), rev'd 348 So.2d 838 (Ala. 1977), on remand 348 So.2d

843 (Ala. Crim. App. 1977). Thus, the introduction of the atomic absorption test constituted a pivotal point in the trial in that it had the potential to reasonably establish in the jurors minds the fact that Wilson did not fire a gun and reasonably raise the inference that Chatom did. The Alabama Court of Criminal Appeals recognized the importance of the test results at trial when it stated:

> The most damaging evidence against the appellant [at trial] consisted of the results of an 'atomic absorption test.' The atomic absorption test allegedly will show whether a person has recently fired a gun. The State, by use of the atomic absorption test sought to show that Wilson had not fired a gun on November 17, 1975. If Wilson did not fire a gun on the day in question, then there would be a strong inference that someone else, possibly the appellant, shot [the deputies].

Chatom, 348 So.2d at 831 (emphasis added). While a court reviewing

counsel's conduct in an ineffectiveness claim is not to judge the actions hindsight, see Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694, it is clear that at the time the evidence was being introduced it would be prejudicial to Chatom's case. Chatom's trial counsel failed, however, to make any contemporaneous objection to either the qualifications of the expert, the conditions under which the administration of the test occurred or the reliability of the test in general. See testimony of Dr. McDuffie, supra.

One reason proffered for the failure to contemporaneously object to the testimony of Dr. McDuffie was that the prosecution failed to inform defense counsel of the test or its results prior to the point at which Dr. McDuffie took the witness stand, thus surprising counsel for the defense. While surprise may have in fact occurred, this failure

by the prosecution to inform defense counsel of the test should have made Chatom's counsel even more sensitive to attempting to exclude the testimony; an earlier order of the court requiring the prosecution to turn over to the defense copies of any tests performed by the Alabama Department of Toxicology was binding at the time the undisclosed test result were offered.

In addition to the potential objection based upon the failure to disclose the test results, Chatom's counsel had other credible, if not sufficient, grounds for objecting to the predicate and expert opinion offered by Dr. McDuffie. As the Alabama Court of Criminal Appeals points out, the conditions under which the test's administration occurred are questionable at best. See Chatom, 348 So.2d at 833, supra. While we make no determination as to the ultimate admissibility of the

atomic absorption test in this or any other instance, we find that counsel's failure to object under the circumstances present in this case fell below standards of reasonable performance causing the adversarial testing contemplated by the Sixth Amendment to falter concerning this critical issue.

Furthermore, we agree with the finding of the Magistrate that the record in this case does not support the conclusion that the failure to object on the part of Chatom's counsel constituted a tactical decision beyond review under Strickland. The particular conduct at issue in this case cannot be characterized as a tactical decision within the "wide range of reasonable professional assistance" presumed by Strickland. See Strickland, 466 U.S. at 690, 104 S.Ct. at 2066, 80 L.Ed.2d at 695.

B. PREJUDICIAL EFFECT OF DEFICIENT PERFORMANCE

"An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland, 466 U.S. at 691, 104 S.Ct. at 2066, 80 L.Ed.2d at 696. Strickland holds that the proper test for establishing prejudice resulting from counsel error is that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 698. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Thus, in the context of a criminal trial the standard is whether a jury, absent the errors, would have had a reasonable doubt concerning the guilt of

the accused. Strickland establishes:

> In making [a prejudice] determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the ... jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidence picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.

Id. at 695-96, 104 S.Ct. at 2069, 80 L.Ed.2d at 698-99. The state'e entire case against Chatom consisted of circumstantial evidence. Evidence of the atomic absorption test could raise or may have supported a multitude of inferences damaging to Chatom. See Chatom, 348 So.2d at 830-31. Due to the general verdicts rendered by the jury

which may have convicted Chatom on one of two different theories of liability, this court cannot say that evidence of the atomic absorption test did not have a prejudicial affect upon the jury's verdict. The protracted appellate history of this case indicates that the question of Chatom's guilt beyond a reasonable doubt is a close one. See generally Chatom, 348 So.2d 828 (Ala. Crim. App. 1976), rev'd 348 So.2d 838 (Ala. 1977), on remand 348 So.2d 843 (Ala. Crim. App. 1977). While a timely objection by Chatom's counsel may have not excluded the evidence of the atomic absorption test, the lack of any objection clearly prejudiced Chatom since the adversarial testing contemplated by the Sixth Amendment did not occur. Additionally, the failure of Chatom's trial counsel to object later foreclosed Chatom from raising the issue of improper admission of the test on

appeal due to the Alabama Supreme Court's determination that the issue was procedurally defaulted by counsel's failure to contemporaneously object.

Given the close question of Chatom's guilt beyond a reasonable doubt under one or both of the prosecution's theories and the form of the verdicts which do not indicate the theory upon which the jury based its verdict, we find that absent counsel's errors concerning the atomic absorption test there is a reasonable probability that the result of the proceeding may have been different.

CONCLUSION

For the foregoing reasons we conclude that the petitioner has overcome the strong presumption of attorney competence and has shown that counsel's performance in regard to the atomic absorption test fell below the

objective standard of reasonableness and that such errors caused the petitions prejudice. We conclude that the district court's finding to the contrary is clearly erroneous, and that any decision to the contrary would be manifest error and would not be supported by the record. Accordingly, the decision of the district court is reversed and the case is remanded to the district court with instructions to issue the writ of habeas corpus conditioned on the state's right to retry the petitioner within a reasonable time.

REVERSED AND REMANDED.

APPENDIX B

Jere Chatom, Petitioner,

v.

J. D. White, Respondent.

C. A. No. 81-0449-C

United States District Court,

S.D. Alabama, S.D.

August 31, 1987

MEMORANDUM OPINION AND ORDER

Petitioner was convicted in 1976 of first degree murder for the shooting deaths of two Mobile County Deputy Sheriffs, and sentenced to two consecutive terms of life imprisonment. The Alabama Court of Criminal Appeals reversed the conviction, though its reason for doing so was unclear. On original hearing, Chatom v. State, 348 So.2d 828 (Ala. Cr. App. 1976), the Court stated:

> Thus, viewing the evidence in its most favorable light

> for the State, the circumstantial evidence here does not point toward [chatom] as the person who fired the fatal shots. Instead, it strongly points toward [Chatom's accomplice]. Unless circumstantial evidence is sufficiently strong to point toward [Chatom] as tahe guilty party, it is insufficient, standing alone, to support a conviction.
>
> The record as we perceive it, minus the results of the atomic absorption test, would not support a conviction for murder. Even if the results of the test were properly presented and admissible, there would be an extremely close question as to whether a prima facie case had been established.

Id., at 835.

On rehearing, id. at 837, the Court stated:

> To clarify this opinion and make the holding of this court explicit, we make two points:
>
> First, the conviction of [Chatom] was not reversed due to insufficiency of the evidence.

> Secondly, reversal was due to the introduction into evidence of the atomic absorption test without a proper predicate.

The Alabama Supreme Court reversed the decision of the Court of Criminal Appeals, Chatom v. State, 348 So.2d 838 (Ala. 1977), and remanded to the Court of Criminal Appeals, cryptically concluding that the trial court did not abuse its discretion in admitting the results of the atomic absorption test, because petitioner's counsel did not object to the pertinent testimony at the time it was offered. On remand, the Court of Criminal Appeals affirmed the conviction. Chatom v. State, 348 So.2d 843 (Ala. Cr. App. 1977). The Court stated:

> Earlier, we had expressed doubt as to the sufficiency of the evidence without the results of the atomic absorption test. Since that testis admissible by default, a jury question is present. If the State's negative proof may be

> considered,[1] the jury could have determined that since there was no evidence that [Chatom's accomplice] fired the murder weapon, then it must have been the appellant who fired the fatal shots. Such evidence goes, not toward proof of conspiracy, but toward proof that appellant himself was the triggerman.

Id., at 844 (emphasis supplied).

Petitioner's original petition in this court for writ of habeas corpus under 28 U.S.C. §2254 asserted that he was denied a fair trial because of extensive pretrial publicity; that his counsel was ineffective; and that there was insufficient evidence to sustain his conviction. The Magistrate recommended (Doc. #34) that this petition be dismissed on the merits. Petitioner

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[1]The record discloses that the results of the atomic absorption test run on the body of petitioner's accomplice were negative, and the prosecution introduced the negative results to establish that petitioner's accomplice did not fire the fatal shots.

timely objected to this recommendation. Having reviewed the record de novo, and having considered the Magistrate's recommendations and the petitioner's objections, the court enters the following opinion.

A. Sufficiency of the Evidence.

The Magistrate candidly acknowledged that "the sufficiency of the evidence to support Petitioner's conviction is a close and troubling question...." (Doc. #34, at 15). Reviewing the evidence under the standard of review established by the Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), and considering the trial

court's charge to the jury,[2] the Magistrate concluded (Rec. I, at 20) that "a rational juror ... could apply the Court's accomplice charge and find the Defendant guilty as a principal." Petitioner challenges this conclusion on the ground that the Magistrate "misapplied the Jackson v. Virginia, standard that conflicting inferences must be resolved in favor of the prosecution." (Obj., at 18). Petitioner asserts that the evidence cannot reasonably support the inference that petitioner was the triggerman, and that "a reasonable juror must necessarily entertain a reasonable

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[2]The Magistrate found, and the court agrees, that the trial court's accomplice/conspiracy charge was correct under Alabama law. See, Doc. #34, at 19. Petitioner challenges neither the legality nor the constitutionality of he charge.

doubt"[3] as to whether petitioner was an accomplice, because theories of guilt or innocence were equally supported by the evidence presented and the inferences to be drawn from the evidence. See, Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982). The court rejects these arguments.

Crosby v. Jones is instructive in this case. There, the Court of Appeals had to apply the Jackson v. Virginia standard to a case wherein the prosecution relied solely upon circumstantial evidence to sustain a conviction. Relying upon Ulster County Court v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979), the Court concluded that:

> ...if the reviewing court can only say that the ultimate fact is more likely than not, then the Jackson v. Virginia standard has not

[3]Martin v. State, 730 F.2d 721, 724 (11th Cir. 1984).

> been met.... This is because Jackson requires that a reasonable juror be able to find the defendant guilty beyond a reasonable doubt (italics in the original), and if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilty and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt.

Id., at 1383 (emphasis supplied).

Petitioner's argument that the record equally supports theories of guilt and innocence is a misapplication of Cosby. Cosby requires that the court first draw all reasonable inferences from circumstantial evidence in favor of the prosecution, and then determine whether the record equally supports theories of guilt and innocence. Petitioner would have the court reverse the order of the steps, a procedure of review which Jackson v. Virginia clearly precludes. If the court were able to

elect which inferences should be drawn in favor of the prosecution, and which inferences should be drawn in favor of the defense, the court agrees that resolution of petitioner's claim might be different. Since the court is unable to engage in such pervasive review of the evidence, however, the court agrees with the recommendation of the Magistrate that a rational trier of fact could have concluded beyond a reasonable doubt that petitioner was guilty under the trial court's accomplice charge.

B. Ineffective Assistance of Counsel.

The Supreme Court held in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), that a habeas corpus claim of ineffective assistance of counsel is established upon proof by the petitioner that counsel's performance was actually deficient, and that such deficiency

prejudiced petitioner's defense. As the Magistrate correctly observed, the ineffective assistance claim in this case is premised upon a single error committed by petitioner's trial counsel: failure to contemporaneously object to testimony concerning the atomic absorption test performed on swabs taken from the hands of petitioner's accomplice. The court agrees with the Magistrate that a single error by counsel can be of sufficient magnitude to render counsel's assistance ineffective. See, Birt v. Montgomery, 725 F.2d 587 (11th Cir. 1984); Nelson v. Estelle, 642 F.2d 903 (5th Cir. Unit A 1981). The court further agrees with the Magistrate that petitioner was prejudiced by counsel's failure to object to the admissibility of the atomic absorption test. Finally, having reviewed the entire state court record, and having considered trial counsel's

failure to object in the context in which it occurred, the court concludes with the Magistrate that petitioner has not sustained his burden of proving under Strickland that counsel's failure was actually deficient.

Petitioner's objection to the Magistrate finding in this respect is unavailing. Petitioner concedes that counsel's failure to contemporaneously object to the admissibility of the test results was due to his being surprised by the introduction of the testimony, and argues that, if the court does not find the conduct actually ineffective, the court will be condoning the prosecutorial misconduct of failing to disclose the test results pursuant to court ordered discovery. The court discerns no basis in the record from which to conclude, and the petitioner does not allege, that the prosecution intentionally withheld the test results

from petitioner, and whether the prosecution's mere failure to disclose the results rendered petitioner's conviction unconstitutional is the subject of one of petitioner's amended claims, and need not be addressed here. For purposes of the claim of ineffective assistance, however, petitioner cites no authority for the proposition that counsel otherwise effective under Strickland is rendered ineffective because of the acts or omissions of another. The court rejects petitioner's argument as a basis for refusing to follow the recommendation of the Magistrate that petitioner's claim of ineffective assistance of counsel be dismissed on the merits.

C. Prejudicial Pretrial Publicity.

Petitioner does not object to the Magistrate's conclusion that pretrial publicity did not prejudice petitioner's

defense, and therefore did not warrant reversal of his conviction. Accordingly, the court need not review de novo the Magistrate's conclusion that this claim should be dismissed.

In view of the foregoing opinion, it is

ORDERED that all claims in petitioner's original petition be, and hereby are, DISMISSED ON THE MERITS. The court will by separate document establish a procedure and schedule for disposition of remaining claims in the amended petition.

DONE this 31st day of August, 1987.

/s/ Emmett R. Cox
UNITED STATES DISTRICT JUDGE